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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Cynthia Williams, Plaintiff, vs. City of Mesa, a municipal corporation; John Santiago, individually, and in his capacity as a Mesa Police Officer, Defendants.	No. CV-09-1511-PHX-LOA **ORDER**

This matter arises on the Motion for Summary Judgment by Defendants City of Mesa ("City") and Mesa Police Officer John Santiago (collectively "Defendants"). (Doc. 37) Defendants argue that because the record lacks sufficient evidence to support Plaintiff's claims, summary judgment is appropriate on all claims. (*Id*. at 1)

After review of the briefing, including Plaintiff Cynthia Williams' ("Plaintiff") second Response in opposition to the Motion, doc. 50[1]; the Defendants' Reply, doc. 47; the parties' Statements of Facts, including their Controverting Statement of Facts, docs. 45-46,

[1] On January 19, 2011, the Court struck Plaintiff's Response without prejudice for violations of the District Court's Local Rules pursuant to its inherent authority. *Ready Transportation, Inc., v. AAR Manufacturing, Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) (court's inherent authority "includes the power to strike items from the docket as a sanction for litigation conduct.") Plaintiff timely re-filed her Response but the Court will consider only Plaintiff's arguments and authorities on her excessive force and state law claims. (Docs. 49, 51, 56)

the Court concludes that disputed questions of fact exist for jury resolution on Plaintiff's claims for alleged use of excessive force (Count I), negligence (Count III), negligence *per se* (Count IV), and punitive damages on her excessive force claim against Officer Santiago in his individual capacity (Count VIII). Summary judgment is granted on Plaintiff's claims of assault and battery (Count II), negligent supervision and training (Counts VI and VII), and punitive damages against the City, Officer Santiago in his official capacity, and Plaintiff's state law claims (Count VIII).

I. Introduction

Plaintiff commenced this § 1983 action on April 24, 2009, in the Maricopa County Superior Court, State of Arizona. (Doc. 1-4, Exhibit ("Exh") 2 at 5-13) On July 22, 2009, the City Defendants and the Mesa Police Department[2] removed the case to this District Court. (Doc. 1) Federal subject-matter jurisdiction is predicated upon 28 U.S.C. § 1331 (federal question) and supplemental jurisdiction exists over Plaintiff's state law claims pursuant 28 U.S.C. § 1367(a). Upon the voluntary consent of all parties, docs. 6, 12, this matter is before the undersigned Magistrate Judge for all purposes including entry of final judgment. 28 U.S.C. § 636(c).

II. Background

In the Complaint, Plaintiff alleges violations of her civil rights under the Fourth Amendment of United States Constitution (Count I: excessive use of force) pursuant to 42 U.S.C. § 1983 based on a traffic stop and subsequent arrest by Mesa police on April 26, 2008. Specifically, the Complaint alleges that, *inter alia*, Officer John Santiago "grabbed Plaintiff and violently slammed her against the Mesa Police patrol vehicle [and] then aggressively and violently grabbed Plaintiff's right arm and began excessively twisting her arm." (Doc. 1-4, ¶ 17 at 7) Plaintiff sustained a serious injury to

[2] Defendant Mesa Police Department was dismissed as a party on August 18, 2009 because it is not a jural entity subject to suit. (Doc. 8)

her right arm during the course of her arrest.[3] Plaintiff also alleges several state-law claims: assault and battery (Count II), negligence (Count III), negligence *per se* (Count IV), negligent infliction of emotional distress (Count V),[4] negligent supervision (Count VI) and negligent training (Count VII). (*Id*. at 5-13) Plaintiff seeks compensatory and punitive damages, attorneys' fees, litigation costs including expert and non-expert witness fees, and such other relief as the Court may deem just and proper. (*Id*. at 12)

III. Facts

Up until the time of Plaintiff's arrest, the parties generally do not dispute the material facts. Because this matter arises on Defendants' Motion for Summary Judgment, the Court views the facts in the light most favorable to Plaintiff. *Adams v. Speers*, 473 F.3d 989, 990-91 (9th Cir. 2007).

At 1:00 a.m. on April 26, 2008, Mesa Police Officer Joseph Panagakis observed Plaintiff driving at an excessive speed (65 m.p.h.[5]) in the center lane (left turn only) westbound on University Drive near Higley in Mesa, Arizona. (Defendants' Statement of Facts ("DSOF"), ¶ 1 at 1; doc. 38) When he pulled Plaintiff over and approached her vehicle, Officer Panagakis observed she was wearing only a shear negligee and matching thong, "frantically crying." (Plaintiff's Statement of Facts ("PSOF"), ¶ 1 at 5-6, doc. 45; Exhibit ("Exh") A at 27, 108-110) Plaintiff indicates she snuck out of her boyfriend Sam's house in a rush to go to her home to avoid an argument and confrontation with him. (PSOF, ¶ 1 at 5-6) Plaintiff immediately admitted to Officer Panagakis,

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[3] Plaintiff sustained a spiral fracture to her right humerus a few inches above her elbow, requiring open reduction and internal fixation. (PSOF, ¶ 29, doc. 45 at 9; DSOF, ¶ 37)

[4] On February 14, 2011, the parties stipulated to the dismissal with prejudice of Plaintiff's claim for negligent infliction of emotional distress. (Docs. 56, 58)

[5] Plaintiff testified in her deposition that she was driving at the posted speed limit. (Plaintiff's depo, Exh A, at 116; doc. 45 at 116) In his deposition, Officer Panagakis testified that when he pulled her over, Plaintiff admitted to him she was speeding. (Officer Panagakis's depo, Exh 1, at 28, doc. 38-2 at 5)

who was familiar with Plaintiff from prior police contact, that she was driving on a suspended license. (DSOF, ¶¶ 2, 4-6) Because Plaintiff was embarrassed about her attire, Officer Panagakis instructed Plaintiff to remain in her car while he returned to his police vehicle to run a computer check on her. The computer check confirmed Plaintiff's driving privilege was suspended. (DSOF, ¶¶ 7-8; Exh 1 at 28) After verifying her driving privilege was suspended, Officer Panagakis radioed for backup Mesa police officers to assist him in conducting an inventory of the contents of Plaintiff's vehicle, calling a tow truck and impounding her vehicle.[6] (DSOF, ¶¶ 9-10) Pursuant to the Mesa Police Department's policy, Mesa officers conduct an inventory search of a vehicle before having it towed. (DSOF ¶ 17)

To assist Officer Panagakis with the impound process, Mesa Officers John Santiago, Travis Rowland and Edwin Nickerson arrived at the scene. (DSOF ¶ 11, PSOF ¶ 9) Upon their arrival, and although Plaintiff denies she was angry, the officers observed Plaintiff shouting into a cell phone, banging her head and hands on the steering wheel, stomping her feet, and thrashing back and forth in her car seat. (DSOF ¶ 12, PSOF ¶ 8) While Officer Nickerson was conducting the inventory of Plaintiff's vehicle, he discovered a home-made crack pipe with the tip wrapped in burnt aluminum foil in the front center console.[7] (DSOF ¶ 21) Plaintiff denies the crack pipe was hers. (PSOF ¶ 34)

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[6] Officer Panagakis was required to "cause the removal and either immobilization or impoundment" of Plaintiff's vehicle for thirty days since he determined that Plaintiff was driving a vehicle while her "driving privilege [was] suspended[.]" Arizona Revised Statutes ("A.R.S.") § 28-3511(A)(1), (E) (2008); *State v. Organ*, 225 Ariz. 43, 234 P.3d 611(Az.Ct.App. 2010); *Salazar v. City of Maywood*, ___ F.3d ___, 2011 WL 477686 (9th Cir. 2011) (city statute, which provides for notice and an opportunity to be heard, permitting impoundment of vehicles for up to thirty days does not violate vehicle owners' constitutional rights when an individual is found to be driving on a suspended or revoked license or without ever having been issued a driver's license.)

[7] "[A]lthough crack and powder cocaine are different forms of the same drug, the routes of administration, their physiological and psychological effects, and the manner in which they are sold set the two forms of the drug apart. Crack is normally smoked in a glass pipe, while powder cocaine is most often ingested nasally. Because it is smoked, crack has

Before the crack pipe was discovered, Officer Santiago approached Plaintiff, still seated in her vehicle, allowed her to finish putting on her slacks laying on the passenger's seat,[8] and escorted her to a nearby sidewalk. (DSOF ¶ 13-15) While on the sidewalk approximately 20 to 30 feet from her vehicle, Plaintiff asked if she could have her purse and cell phone she had left in the vehicle so she could call her boyfriend. (PSOF ¶13-14; Plaintiff's depo, Exh A, at 131) At this time, Officers Nickerson and Rowland were beginning their inventory of her vehicle.

In her deposition, Plaintiff testified, "I kept asking for my phone. They were over there searching my car, and I said, 'Well, can I just get my phone,' . . . because I want to call [my boyfriend] before the tow truck comes to get my car. They just kept saying, 'Wait. Wait a minute. Wait a minute.'" (Plaintiff's depo, Exh A, at 105; doc. 45 at 105) Plaintiff claims she took one or two steps towards her car to retrieve her phone, at least, 20 feet away when one of the officers said "stop" or "stay still." (PSOF ¶ 14, 16; Plaintiff's depo, Exh A, at 125-126) Plaintiff admits that Officer Panagakis told her twice not to go back to her car. However, she denies she was told three or more times not to go to her vehicle and denies she was told if she tried to go to her vehicle again, she would be arrested. (PSOF, ¶ 16; Plaintiff's depo, Exh A, at 123, 126-127)

Fifty years of age at the time, about 5 feet 2 inches tall, and weighing only 115 pounds or so, Plaintiff claims that without any warning, Officer Santiago, a former

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a quicker and more intense effect on the brain than powder cocaine ingested nasally, causing a greater desire for more. Crack is also sold in smaller quantities and lower unit prices than powder cocaine, thereby reducing the financial barrier which had previously limited cocaine usage." *United States v. Harding*, 971 F.2d 410, 413 (9th Cir. 1992) (footnote omitted). As footnote 3 indicates, most cocaine users will smoke crack while few are willing to inject cocaine into their arms. *Id*.

This information is offered for background purposes only and is immaterial to this summary judgment motion because Plaintiff was neither arrested nor charged with Possession of Drug Paraphernalia, a Class 6 felony and punishable by a sentence of 6 months to 1.5 years in prison under Arizona law. A.R.S. §§ 13-3415(A), 13-702(A), (D).

[8] At some time before her arrest, Plaintiff also put on a jacket.

Navy serviceman trained in hand-to-hand combat, standing about 6 feet 3 inches, and weighing 250 pounds, grabbed Plaintiff by the right arm and fractured it in the process of placing her hands in handcuffs behind her back. (PSOF ¶¶ 19, 43, 48-49; Plaintiff's depo, Exh A, at 125-126) "[H]e just ripped, popped my arm, and threw it behind my back. It was never - it was like without warning." (Plaintiff's depo, Exh A, at 127, 140) Plaintiff claims Officer Santiago grabbed her at the elbow, "had me in some kind of hold," and "he hit my elbow with his hand." (*Id*. at 134-135; DSOF, ¶ 39[9])

Plaintiff denies she struggled with Officer Santiago, denies Officer Panagakis touched her or was even on the sidewalk when Officer Santiago broke her arm, denies she tried to get away from Officer Santiago, and claims she was only reacting to him hurting her by trying to move her body to a position that relieved the pain. (Plaintiff's depo, Exh A, at 133, 134, 140) After breaking her arm, Plaintiff claims Officer Santiago immediately twisted her arm around her back and put on the handcuffs. She testified she immediately screamed, "My arm, my arm." Officer Santiago asked, "Are you hurt?" Plaintiff responded, "Yes, [m]y arm, my arm." Officer Santiago then removed the handcuffs and asked her if she wanted him to call an ambulance. She said, "Yes." (*Id*. at 142) An ambulance arrived shortly thereafter and eventually transported Plaintiff to a local hospital. (PSOF, ¶ 27)

Plaintiff was never cited for a traffic violation nor charged with a crime arising out of the events of April 26, 2008. (PSOF, ¶ 38) Plaintiff denies, and there is no non-opinion evidence to dispute, that Plaintiff consumed alcohol or used or possessed illicit drugs before she was stopped by Officer Panagakis. (*Id*., ¶¶ 31-33, 37) Defendants admit that Plaintiff never assaulted or attempted to assault any of the police officers. (*Id*, ¶

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[9] Defendants point out that Plaintiff testified that "[Officer Santiago] hit my elbow with his hand [and] [t]hat's what caused my arm to break." (DCSOF, ¶ 39, Plaintiff's depo, Exh 3 at 135, doc. 38-4 at 12) Plaintiff's counsel, however, does not dispute that Plaintiff's own expert witnesses acknowledge that Plaintiff's arm was not broken because Officer Santiago "hit her." (*Id*.)

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Defendants tell a much different story. Defendants contend that Officer Panagakis escorted Plaintiff to the sidewalk away from roadway traffic and began explaining to her why he was citing her. As he did so, Plaintiff "wasn't paying attention to what [he] was saying and she kept looking over at Officer Nickerson, who was starting his inventory of [her] vehicle[.]" (Officer Panagakis' depo, Exh 1, at 29-30, doc. 38-2 at 7) Plaintiff was "very agitated," "antsy," and said, "[W]hat's he doing in my car? There's nothing in there. I have nothing. I need my purse [and] cell phone. And she kept going toward the vehicle." (*Id.* at 30, PSOF, ¶ 18) Officers Santiago and Panagakis were both on the sidewalk with Plaintiff at this time. Officer Panagakis explained to her that Officer Nickerson was inventorying her vehicle because it was being impounded and that she needed to "[l]et us do our job." (*Id.*)

According to Defendants, the first time Plaintiff started to walk toward Officer Nickerson and her car, Officer Panagakis told her to stop and placed himself between Plaintiff and her vehicle to block her path but she "kept trying to go around [him]." (*Id.*) Three times, Defendants claim, Plaintiff was told to stay away from Officer Nickerson and her vehicle, but she continued to try to walk towards Officer Nickerson, saying that she needed her purse and phone. (*Id.*)

After Plaintiff's second or third attempt to go to her vehicle, and because she refused to comply with his commands, Officer Panagakis grabbed her left arm and wrist and again escorted her back to the sidewalk. (*Id.* at 30-31) At this time, Officer Panagakis told Plaintiff, "if you're going to keep this up, I will arrest you." (*Id.* at 31) Nevertheless, Plaintiff again tried to go to her vehicle and this time, rather than citing and releasing her as he had planned, Officer Panagakis arrested her because he "couldn't stop her from continuing to interrupt on (sic) the inventory and then interrupting the traffic stop." (*Id.* at 55) When Officer Panagakis grabbed her left arm, Officer Santiago grabbed her right arm. (*Id.* at 31) Plaintiff immediately pulled away from Officer Panagakis' grasp but Officer Santiago was able to hold on to her right arm and hand as he physically

escorted her over to Officer Panagakis' patrol car. (*Id.* at 31, 55; DSOF ¶¶ 22-24) As he had been trained to do, Officer Santiago used an "O.C.C.S. lock hold"[10] on Plaintiff's right hand and arm as Plaintiff fought to get loose. (DSOF ¶ 25; Officer Santiago's depo, Exh 2 at 148, doc. 38-3 at 6) Plaintiff began "flailing," "twisting," and "spinning" "like a "Tasmanian devil." (Officer Panagakis' depo, Exh 1, at 31, 62) The struggle continued to the front of Officer Panagakis' patrol car where Officer Santiago pinned her between the patrol car and himself with his leg while he held on to her right hand and arm. (Officer Santiago's depo, Exh 2 at 148) Plaintiff "continued to resist, she would go down, come up, go down, come up and try to twist around her leg and fall." (*Id.*) At this time, Officer Santiago heard a "pop in her arm" but she continued resisting and fighting. (*Id.* at 148-149) Plaintiff did not immediately scream in pain or complain that she was injured but later did so after she was placed in the police vehicle. (DSOF ¶¶ 25-27) As Plaintiff sat in the police vehicle, the officers heard her yell that her arm hurt so the officers promptly assisted her from the patrol car, removed her handcuffs, and helped take off her jacket. At that point, the two officers saw that her upper right arm was misshapen. (PSOF, ¶¶ 31-33) Officer Santiago then called the fire department for emergency medical assistance and his supervisor to report the incident. Fire department paramedics treated Plaintiff at the scene and she was transported by ambulance to Banner Gateway Hospital. (*Id.*, ¶¶ 34-36)

Defendants' Reply argues that "[i]t is true that Plaintiff remembers some details differently than do the officers, but these details are not material to the motion for

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[10] Officer Santiago described an O'Donnell Continuous Control System ("O.C.C.S.") lock hold as "a control hold." Generally, a police officer stands behind an arrestee and grasps the arrestee's right hand with the officer's right hand and then the arrestee's right forearm between the wrist and elbow with the officer's left hand. The arrestee's right "arm is grabbed, twisted and [is] rotated" behind the arrestee's back at which time the officer places his handcuffs on the arrestee's right wrist. "[I]t's a technique which uses pain compliance, depending on the person's tolerance." (Officer Santiago's depo, Exh C at 149-158, doc. 41-3 at 50-52)

summary judgment. Both officers testified that Officer Panagakis grabbed Plaintiff's left hand, but she pulled away from him three times. Plaintiff denies that Officer Panagakis ever touched her. But Officer Panagakis is not a named defendant, and it is not necessary in evaluating the propriety of Officer Santiago's actions to determine that Plaintiff was at the same time pulling away from Officer Panagakis." (Doc. 47 at 3) Defendants point out the many inconsistencies in the testimony. "Officer Santiago testified that he was holding the Plaintiff's arm when she thrashed forward and backward into him and that is when her arm broke. Plaintiff has the burden of prooving (sic) that she suffered injury because of excessive force by Officer Santiago. Here, Plaintiff does not have evidence that excessive force was used instead she simply argues that she suffered injury." The Court disagrees.

IV. Summary Judgment Standard

A moving party may, at any time, move for summary judgment on all or any part of a claim. Fed.R.Civ.P. 56. The Court may only grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, determines that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Substantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc*., 447 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. In considering the evidence, the Court is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The moving party need not disprove matters on which the opponent has the burden of proof at trial. *Celotex*, 477 U.S. at 323.

The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Matsushita Elec. Industries Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 685-87 (1986). There is no genuine issue

for trial unless there is sufficient evidence favoring the non-moving party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249-50. However, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his [or her] favor." *Id.* at 255. Allegations of civil rights violations are to be liberally construed. *Thomas v. Youngblood*, 545 F.2d 1171, 1192 (9th Cir. 1976).

When considering a motion for summary judgment based on qualified immunity, district "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" *Scott v. Harris*, 550 U.S. 372, 378 (2007) (alteration in original) (citations omitted). "However, when the facts, as alleged by the non-moving party, are unsupported by the record such that no reasonable jury could believe them, we need not rely on those facts for purposes of ruling on the summary judgment motion." *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010) (citing *Scott*, 550 U.S. at 380); *City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1369 (9th Cir. 1992), *cert. denied*, 506 U.S. 908 (1992) (a party cannot defeat a summary judgment motion by producing a "mere scintilla of evidence to support its case.").

The facts which establish a genuine issue of fact must be in *both* the district court's file and set forth in the parties' briefings. *Carmen v. San Francisco Unified School District*, 237 F.3d 1026, 1029 (9th Cir. 2001); Rule 56(c)(3), Fed.R.Civ.P. The trial court

> may determine whether there is a genuine issue of fact, on summary judgment, based on the papers submitted on the motion and such other papers as may be on file and specifically referred to and facts therein set forth in the motion papers. Though the court has discretion in appropriate circumstances to consider other materials, it need not do so. *The district court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found.*

Id. at 1031 (emphasis added).

V. Traffic Stop

Temporary detention of individuals during a police automobile stop, even if

only for a brief period, constitutes a seizure within the meaning of the Fourth Amendment. Thus, an automobile stop is subject to the constitutional requirement that the seizure not be "unreasonable" under the circumstances. *Whren v. United States*, 517 U.S. 806, 809-10 (1996)). Traffic stops are investigatory stops, which require only a showing of reasonable suspicion, *i.e.*, whether under the totality of the circumstances, Officer Panagakis had a reasonable suspicion that a traffic law violation occurred. *Arizona v. Johnson*, ___ U.S.___, 129 S.Ct. 781, 784 (2009) (permitting a limited stop "when the police officer reasonably suspects" a traffic violation); *United States v. Lopez- Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000) ("[T]he Fourth Amendment requires only reasonable suspicion in the context of traffic stops."). Reasonable suspicion requires "specific, articulable facts which, together with objective and reasonable inferences, form a basis for suspecting that a particular person is engaged in criminal conduct." *United States v. Thomas*, 211 F.3d 1186, 1189 (9th Cir. 2000) (internal quotations omitted). Reasonable suspicion is less than probable cause, but more than an "inchoate and unparticularized suspicion or 'hunch.' " *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

Here, Plaintiff does not challenge whether Officer Panagakis had reasonable suspicion to stop Plaintiff or whether probable cause existed to arrest her because of her undisputed admission at the scene she was driving on a suspended license.

VI. Qualified Immunity

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., Amend. IV. It is clearly established that "[t]he use of excessive force by police officers in an arrest violates the arrestee's Fourth Amendment right to be free from an unreasonable seizure." *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986). The Ninth Circuit has held that a § 1983 claim may be based upon the Fourth Amendment if the police used excessive force during an arrest. *Robins v. Harum*, 773 F.2d 1004 (9th Cir. 1985).

At the summary judgment stage in § 1983 actions where the plaintiff has alleged a violation of the Fourth Amendment, the qualified immunity question is closely related, though not identical, to the question on the merits: whether the plaintiff has raised a triable issue regarding the constitutional violation. Defendants argue that they are entitled to qualified immunity on Plaintiff's claim of use of excessive force. The Court must determine, viewed in the light most favorable to Plaintiff, whether the facts alleged show Officer Santiago's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Where the facts are disputed, their resolution and determinations of credibility "are manifestly the province of the jury." *Santos v. Gates*, 287 F.3d 846, 852 (9th Cir. 2002).

Police officers and other state officials are entitled to qualified immunity from section 1983 suits. *Davis v. Scherer*, 468 U.S. 183, 194 n. 12 (1984); *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989). "Qualified immunity balances two important interests - the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the [police officer's] error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, ___, 129 S.Ct. 808, 815 (2009) (citation and internal quotation marks omitted).

In *Saucier*, *receded from by Pearson*, 129 S.Ct. at 815, the Supreme Court instructed lower courts deciding summary judgment motions based on qualified immunity to consider "this threshold question: Taken in light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id*. at 201. If not, then "there is no necessity for further inquiries concerning qualified immunity." *Id*. If so, then "the next, sequential step is to ask whether the right was clearly established." *Id*. A constitutional right is clearly established when, "on a favorable view of the other parties' submissions[,]" "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*.

If the right is not clearly established, the individual public officials are entitled to qualified immunity if a reasonable official could have believed that his or her conduct was lawful. *Thompson v. Souza*, 111 F.3d 694, 698 (9th Cir. 1997). The Supreme Court's 2009 decision in *Pearson* clarified that a district court is "permitted to exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 129 S.Ct. at 818. The Court will consider the pending summary judgment motion in view of the foregoing principles.

A. Excessive Force

Plaintiff claims that Officer Santiago used excessive force in effectuating her arrest in violation of her rights under the Fourth Amendment. The Fourth Amendment requires police officers to use only an amount of force that is objectively reasonable in light of all the surrounding circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). In the Ninth Circuit, courts evaluate claims of excessive force under the objective reasonableness standard. *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996). "[T]he reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. Trial courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal citations omitted). Assessing the "nature and quality" of a given "intrusion" requires the factfinder to evaluate the "type and amount of force inflicted." *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994). The governmental interest is measured by considering: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; (3) whether the suspect was actively resisting arrest, and any other exigent circumstances present at the time. *Graham*, 490 U.S. at 394; *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001). Because this balancing "nearly always

requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, [the Ninth Circuit] has held on many occasions that summary judgment or judgment as a matter of law in exces-sive force cases should be granted sparingly." *Santos*, 287 F.3d at 853.

The Ninth Circuit has directed that the "inquiry is not limited to the specific *Graham* factors, . . . [the court] must look to whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*, and then must consider 'whether the totality of the circumstances justifies a particular sort of seizure.' " *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994) (quoting *Graham*, 490 U.S. at 396); *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005)).

Analyzing the *Graham* factors in the light most favorable to Plaintiff, it is undisputed that Plaintiff was driving on a suspended license, a minor, non-violent traffic offense. "Traffic violations generally will not support the use of a significant level of force." *Bryan v. MacPherson*, 630 F.3d 805, 828 (9th Cir. 2010) (citing *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) ("Deville was stopped for a minor traffic violation . . . making the need for force substantially lower than if she had been suspected of a serious crime.")). There is no objective evidence that Plaintiff consumed alcohol or used illicit drugs at the time, or within a reasonable time before, she was stopped by Officer Panagakis. In fact, Officer Panagakis was planning to simply cite and release Plaintiff but he changed his mind and decided to arrest her when she failed to follow his instructions to stop trying to return to her vehicle. The failure to comply with a police officer's lawful order, however, is only a lower level misdemeanor under Arizona law[11]

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[11] Arizona criminalizes the failure to comply with a police officer's lawful order as a Class 2 misdemeanor, carrying up to fours months in jail. *Bohnert v. Mitchell*, 2010 WL 3767566, * 10 (D.Ariz. 2010) (quoting A.R.S. § 28-622(A) ("A person shall not wilfully fail or refuse to comply with any lawful order or direction of a police officer invested by law with authority to direct, control or regulate traffic."). *See also*, *State v. Gonzalez*, 221 Ariz. 82, 84, 210 P.3d 1253, 1255 (Az.Ct.App. 2009) (the misdemeanor offense of Failure to Obey a Police Officer pursuant to A.R.S. § 28-622 "requires proof that: (1) a person (2) wilfully (3)

and, without more, does not justify a significant level of force. This factor weighs in favor Plaintiff.

The "most important" factor under *Graham* is whether the suspect posed an "*immediate* threat to the safety of the officers or others." *Smith*, 394 F.3d at 702 (citing *Chew*, 27 F.3d at 1441) (emphasis added). Defendants admit that Plaintiff never assaulted or attempted to assault any of the police officers. There is no evidence that she posed any danger, much less an immediate danger, to the safety of the officers or anyone else at the scene. Because Plaintiff was dressed in a sheer negligee and thong when she was stopped, it was obvious to the police officers that Plaintiff was not concealing or carrying a firearm or a dangerous instrument. While the officers were rightly concerned that Plaintiff could have become a danger to the two officers while their attention was focused on conducting the inventory, there were a total of four armed Mesa police officers at the scene and the two officers conducting the inventory were, at least, 20 feet away from Plaintiff who, according to Defendants, was between Officers Panagakis and Santiago when she repeatedly asked for her purse and cell phone. There was very little, if anything, Plaintiff could have done to harm the officers under the circumstances. There was no apparent factual or legal reason why one of the officers could not have promptly retrieved her two personal items from her car as she had requested numerous times. Because Plaintiff denies the crack pipe was hers or, inferentially, that she knew it was in her vehicle, and it is inappropriate at the summary judgment stage for the Court to speculate that Plaintiff's real intent in returning to her car was to hide or destroy the crack pipe. This *Graham* factor also weighs in favor Plaintiff.

The *Graham* factors of resistance to arrest and risk of flight also favor Plaintiff. There is no evidence that Plaintiff fled or attempted to flee the scene before or after Officer Panagakis pulled her over. Until after she had requested her purse and cell

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failed or refused to comply with (4) any lawful order or direction (5) of a police officer invested by law with authority to direct, control or regulate traffic.").

phone from her vehicle several times, Plaintiff was cooperative and complied with all of the officers' instructions. Although she admits Officer Panagakis told her twice not to go to her vehicle, Plaintiff denies she was so instructed more than that and denies she was warned if she tried to go to her vehicle one more time, she would be arrested. Plaintiff, a petite, older woman, denies she struggled with the much larger Officer Santiago. Clearly, there is a genuine dispute of material fact whether Plaintiff struggled with Officer Santiago. For summary judgment purposes, her testimony may be fairly described as minimally or passively struggling after Officer Santiago, without warning, grabbed her right arm and began hurting her with his forceful grip. Plaintiff claims she was simply trying to find a position to relieve the pain inflicted by Officer Santiago.

The amount of force used by Officer Santiago is another *Graham* factor to consider. The reasonableness of the force used is determined by balancing the force applied against the need for that force. *Deorle*, 272 F.3d at 1279. Here, the quantum of force used was not as severe as the discharge of a firearm, Taser, or blow from a baton. Nevertheless, Officer Santiago's O.C.C.S. hold on, or torque applied to, Plaintiff's arm was forceful enough to audibly cause a serious spiral fracture to her upper arm (humerus). According to Plaintiff's biomechanical expert, Joseph D. Peles, Ph.D, Officer Santiago "deviated from [the O.C.C.S.] hold and produced excessive torque or internal rotation to the humerus to cause [Plaintiff's] fracture. . . it's my conclusion he did more than . . . the hold as he was taught or as the manual teaches." (PSOF, ¶ 54; Dr. Peles' depo, Exh F at 14, doc. 45-6 at 1) Dr. Peles further opined that Plaintiff's fracture could not have been caused by the movements of Plaintiff's body. (Dr. Peles' depo, Exh F at 16) "[T]he only way I can see that occur would be from the actions of Officer Santiago." (*Id*.) Of course, "[t]he issue[] of proximate causation . . . involve[s] application of law to fact, which is left to the factfinder, subject to limited review." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-841 (1996); *Laisure-Radke v. Par Pharmaceutical, Inc*., 426 F.Supp.2d 1163, 1173 (W.D.Wash. 2006) ("Cause in fact is usually a jury question.") (citation omitted).

The Ninth Circuit also permits a district court to consider the severity of the

injury as another factor to be considered in evaluating "whether the force used was reasonable in light of *all* the relevant circumstances." *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (*en banc*) (emphasis in original). "[I]f the extent of the injury to [plaintiff] is serious enough, a jury could conclude that [the officer] used force in excess of what was reasonable, even if [plaintiff] had been resisting at the time." *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000). Of course, when the circumstances show there is no need for force, any force used is constitutionally unreasonable. *Fontana v. Haskin*, 262 F.3d 871, 880 (9th Cir. 2001). Here, Circuit Judge Beezer's wisdom expressed in his concurring and dissenting opinion in a recent Ninth Circuit excessive force case rings true:

> Although it is true that the officers did not use tasers, batons, or other weapons to subdue [plaintiff], that is not to say that the use of brute force and advantage in weight and size cannot be excessive. To say that would give officers a free pass as long as they just used their hands. The officers could always point to other weapons "they could have used." I do not mean to suggest that "no court may grant summary judgment on excessive force where the police officers are physically much larger than the suspect," Rather, I just think in light of the short time that [plaintiff] resisted, her minor crimes, the vast difference in size and weight, and [a witness'] corroborating testimony, that a reasonable jury could conclude that the officers used excessive force. In light of these facts, a reasonable jury could find that the officers used excessive force when they pulled [plaintiff's] arms around her back, when they used their body weight to keep her down even after she had been handcuffed, or when they left her "handcuffed [on the floor] so tight that it left scars.

Luchtel v. Hagemann, 623 F.3d 975, 988 (9th Cir. 2010) Considering the facts in the light most favorable to Plaintiff, as the Court must, the Court concludes that a reasonable jury could find that Officer Santiago used an unreasonable amount of force under the circumstances of this case.

The Court is mindful that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment." *Graham*, 490 U.S. at 396. Additionally, the Ninth Circuit has held that equally or more aggressive police conduct than used here was objectively reasonable, affirming summary judgment decisions in favor of police officers. *Tatum v. City and County of San Fran-*

cisco, 441 F.3d 1090, 1096 (9th Cir. 2006) (positioning plaintiff's arm behind his back in a bar arm control, placing him against a wall and then forcing him to the ground was not excessive force where the plaintiff ignored the officer's commands and spun around partially escaping the officer's grasp, even though the plaintiff died from a cocaine over-dose); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921-22 (9th Cir. 2001) (twisting plaintiff's left arm behind her with enough force to lift her off the ground and break her watch band while attempting to handcuff her was held to be reasonable where the plaintiff refused to show transit identification upon request, refused to hand over purse when warned that non-compliance would lead to arrest, stiffened her arm and attempted to pull free when the officer grabbed her arm). These cases are factually distinguishable from the case here when viewing the facts most favorable to Plaintiff.

At the summary judgment stage, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255; *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1035-36 (9th Cir. 2005) ("The district court . . . improperly dismissed Dominguez's allegations as consisting of nothing more than 'self-serving statements in her own deposition and affidavit.' Such observations go to whether Dominguez is credible, a determination that is exclusively within the province of the factfinder at trial, not the district court on summary judgment[.]"). The Ninth Circuit has repeatedly stated that whether the force used to arrest an individual is reasonable is "ordinarily a question of fact for the jury." *Liston v. County of Riverside*, 120 F.3d 965, 976 n. 10 (9th Cir. 1997) (citing, among others, *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995); *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994)). When viewed in the light most favorable to the Plaintiff, no reasonable police officer could believe that under these circumstances that the use of such force to badly fracture Plaintiff's arm was justified. In this light, a reasonable jury could find Officer Santiago violated Plaintiff's rights under the Fourth Amendment by using unreasonable and unnecessary force in breaking her arm. Considering the severity and extent of the

force used, the *Graham* factors, and the availability of other means of avoiding or accomplishing the arrest, the question whether the force used here was reasonable is a matter that cannot be resolved in favor of Defendants on summary judgment.

B. Clearly Established

Under the qualified immunity analysis, "[i]f a [Constitutional] violation could be made out on a favorable view of the party's submissions" the Court must ask the next question: whether the right was clearly established. *Saucier*, 533 U.S. at 201. Qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force[.]'" *Id.* at 206 (citation omitted). "Because the focus is on whether [Officer Santiago] had fair notice that [his] conduct was unlawful, reasonable-ness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that [Officer Santiago's] conduct would violate the Constitution, [he] should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) "Of course, in an obvious case, the[] standards [enunciated in *Graham*] can 'clearly establish' the answer, even without a body of relevant case law." *Id.*

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted." *Saucier*, 533 U.S. at 202. The Fourth Amendment prohibits a wide range of governmental intrusions on the person. "The Fourth Amend-ment's requirement that a seizure be reasonable prohibits more than the unnecessary strike of a nightstick, sting of a bullet, and thud of a boot." *Fontana v. Haskin*, 262 F.3d 871, 878 (9th Cir. 2001). Even "[t]he use of handcuffs is the use of force, and such force must be objectively reasonable under the circumstances." *Muehler v. Mena*, 544 U.S. 93, 102 (2005) (concurring opinion of Justice Kennedy citing *Graham*).

The right to be free from excessive force in handcuffing is clearly established in federal precedent. See, *e.g.*, *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003) (rejecting qualified immunity because it was "clearly established" that the

amount of force used in handcuffing the plaintiff was excessive); *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989) ("[T]he officers used excess force on Hansen by unreasonably injuring her wrist and arm as they handcuffed her."). Like the Sixth Circuit concluded in a similar case in *Solomon v. Auburn Hills Police Dept*., 389 F.3d 167 (6th Cir. 2004) (while arresting plaintiff, police officer pinned her against a wall with his weight, his leg in between hers and twisted plaintiff's arm behind her with such force that she sustained a comminuted fracture in several places), Officer Santiago is not entitled to qualified immunity on summary judgment on Plaintiff's excessive force claim.

VII. State Law Claims

A. Assault and Battery

Incorporating the Complaint's prior allegations, Count II alleges that Officer Santiago "committed the common law tort of assault and battery under Arizona law when he used unreasonable and excessive force against the Plaintiff." (Doc. 1-4 at 9) Defendants contend that "there is no evidence that Officer Santiago acted with malice or intended to cause injury, which is a necessary element of this claim[,]" citing *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987). (Doc. 37 at 9)

"To establish the tort of assault in Arizona, Plaintiff must prove that [Officer Santiago] acted *with intent to cause a harmful or offensive contact* or imminent apprehension thereof." *Joseph v. Dillard's, Inc*., 2009 WL 5185393 at * 16 (citing *Garcia v. United States*, 826 F.2d 806, 809 n. 9 (9th Cir. 1987) and Restatement (Second) of Torts § 21 (1965)) (emphasis added); *Al-Asadi v. City of Phoenix*, 2010 WL 3419728, * 6 (D.Ariz. 2010) ("A person commits [assault and battery] under Arizona law where he knowingly touches another person *with the intent to injure* and either fractures a body part or otherwise causes serious physical injury. A.R.S. §§ 13-1203(A), 13-1204(A)(1).") (emphasis added). "Similarly, to establish the tort of battery, Plaintiff must show that [Officer Santiago] 'intentionally caused a harmful or offensive contact' with Plaintiff's person." *Id*. (quoting *Johnson v. Pankratz*, 196 Ariz. 621, 623, 2 P.3d 1266, 1268 (Az.Ct. App. 2000) (citing Restatement (Second) of Torts § 13 (1965)). *See also*, *Howell v.*

Palmer, 2009 WL 2710091, * 3 (Az.Ct.App., Aug. 28, 2009). "Contact is offensive if it 'offends a reasonable sense of personal dignity.'" *Joseph*, 2009 WL 5185393 at * 16 (citing Restatement (Second) of Torts § 19 (1965)). "The plaintiff must establish each of the elements by a preponderance of the evidence." *Howell*, 2009 WL 2710091, * 3 (citing *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, 291, 93 P.3d 486, 491 (Az.Ct.App. 2004)).

Plaintiff has produced no evidence that Officer Santiago intended to cause harm or injury to Plaintiff. Even when viewing the facts and all inferences in Plaintiff's favor, the Court concludes that Officer Santiago is entitled to summary judgment as a matter of law on Plaintiff's assault and battery claim alleged in Count II.

B. Negligence

Plaintiff alleges in Count III of the Complaint that Officer Santiago "committed the common law tort of negligence under Arizona law when he used unreasonable and excessive force against Plaintiff." (Doc. 1-4 at 10) Defendants argue Plaintiff's negligence claim fails because Officer Santiago was justified in using force to handcuff Plaintiff who was resisting arrest. (Doc. 37 at 8) The Court disagrees for purposes of summary judgment.

"To establish a negligence claim, a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) the defendant's failure to conform to that standard; (3) a reasonably close causal connection between the defendant's conduct and the plaintiff's resulting injury; and (4) actual damages." *Las Corrientes, L.L.C. v. The Sundt Companies, Inc.*, 2010 WL 3025520, * 2 (Az.Ct.App., Aug. 3, 2010) (citing *Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983)). "To survive a motion for summary judgment, a plaintiff must produce admissible evidence from which a reasonable jury could find in his favor on each element." *Id.* (citing *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 116-17, 180 P.3d 977, 981-82 (Az.Ct.App.2008).

"A plaintiff must prove both causation-in-fact and proximate causation." *Id.*

(citing *Rogers ex rel. Standley v. Retrum*, 170 Ariz. 399, 401, 825 P.2d 20, 22 (Az.Ct. App. 1991)). Under Arizona law, causation-in-fact exists when the defendant's conduct contributed, even if only to a small degree, to the plaintiff's harm and the harm would not have occurred but for the defendant's conduct. *Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205. "The first element, whether a duty exists, is a matter of law for the court to decide." *Gipson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 230 (Ariz. 2007) (citing *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 356, 706 P.2d 364, 368 (Ariz. 1985)). "The other elements, including breach and causation, are factual issues usually decided by the jury." *Id*. (footnote omitted).

A police officer has a "duty not to inflict bodily harm or death" upon a misdemeanant "in order to effect arrest." *Sonoran Desert Investigations, Inc. v. Miller*, 213 Ariz. 274, 281, 141 P.3d 754, 761 (Az.Ct.App. 2006) (citation omitted). Viewing the evidence in the light most favorable to Plaintiff, sufficient admissible evidence has been presented to create a jury issue on Plaintiff's negligence claim. Defendants' Motion in this regard will be denied.

C. Negligence *Per Se*

The Complaint alleges in Count IV that Officer Santiago "was negligent per se pursuant to A.R.S. 13-3881(B)."[12] (Doc. 1-4 at 10) Because Defendants do not provide any argument or legal authority explaining why summary judgment should be granted on Count IV, summary judgment on Plaintiff's negligence *per se* count[13] will be denied.

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[12] A.R.S. § 13-3881(B) provides:

> B. No unnecessary or unreasonable force shall be used in making an arrest, and the person arrested shall not be subjected to any greater restraint than necessary for his detention.

A.R.S. § 13-3881(B).

[13] "The doctrine of negligence per se . . . is a doctrine applicable to negligence claims whereby a Plaintiff can show the duty and breach elements based on violation of a statute that replaces the general duty of care with a particular standard. Causation and damages must

LRCiv 7.2(b) ("[T]he moving party shall serve and file with the motion's papers a memorandum setting forth the points and authorities relied upon in support of the motion.")

D. Negligent Supervision and Training

Count VI of the Complaint alleges the City "created an unreasonable risk of harm to the Plaintiff by failing to adequately supervise, control or otherwise monitor the activities of" Officer Santiago which caused Plaintiff's damages. (Doc. 1-4 at 11) Count VII claims that the City "created an unreasonable risk of harm to the Plaintiff for failing to adequately train its employee Defendant John Santiago[.]" Plaintiff further alleges the City was "negligent for failing to adequately train its employee regarding use of force." *(Id*. at 12)

Defendants argue that, *inter alia*, "Plaintiff's expert has not offered an opinion that Officer Santiago should have been trained in a different way, or that that supervision in any manner contributed to the incident. Without evidence as to what training or supervision should have been offered, Plaintiff's state law claims are similarly insufficient."[14] (Doc. 37 at 8) Plaintiff contends that "Officer Santiago initially failed to

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still be proved to show liability." *Gomez v. Countrywide Bank, FSB*, 2009 WL 3617650, * 8 (D.Nev. 2009). "'[N]egligence per se' is not a separate cause of action apart from negligence, but rather it is a doctrine whereby a plaintiff can satisfy the duty and breach elements of a negligence cause of action as a matter of law without submitting the breach issue to the fact-finder for a reasonableness finding." *Id*. at 11; *Gunnell v. Arizona Public Service Co.*, 202 Ariz. 388, 392, 46 P.3d 399, 403 (Ariz. 2002) ("Violation of a statutory standard of care is usually held to be negligence per se.").

[14] Because Plaintiff did not fairly state an Eighth or Fourteenth Amendment claim in her Complaint against the City for its alleged deliberate indifference to the public's safety and the rights of others by its training and supervision of its officers' use of force, the Court will only address Plaintiff's state law claims of negligent supervision and training. See, doc. 55 regarding Plaintiff's failure to allege a *Monell* claim.

pass the OCCS training section, it is clear that the City of Mesa failed to supervise his use of these holds, knowing his trouble with them and his history, and it also failed to properly train him as well as other officers in the use of these hold techniques knowing that they involved a greater risk of injury." (Doc. 50 at 13) Plaintiff's Response fails to cite facts either in the record or her Statement of Facts that support her claims of negligent supervision and training. *See*, LRCiv 56.1(b) ("Any party opposing a motion for summary judgment must . . . set forth in that paragraph and a reference to the specific admissible portion of the record supporting the party's position if the fact is disputed[.]"); *Carmen*, 237 F.3d at 1029 ("[T]he district court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found."). Neither side cites to any state law cases for support or opposition to Defendants' Motion on these state law claims.

To prove negligent supervision and retention, Plaintiff must show that the City knew or should have known that Officer Santiago was unfit or not a competent police officer and that the City's retention of, and failure to supervise, Officer Santiago caused injury to Plaintiff. *Humana Hosp. Desert Valley v. Superior Ct. (Edison)*, 742 P.2d 1382, 1386 (Az.Ct.App. 1987); *City of Phoenix v. Peterson*, 462 P.2d 829, 832 (Az.Ct.App. 1969); *Joseph*, 2009 WL 5185393 at 18 ("An employer is liable for the tortious conduct of its employee if the employer was negligent or reckless in hiring, supervising, or otherwise training the employee."). "If the theory of the employee's underlying tort fails, an employer cannot be negligent as a matter of law for hiring or retaining the employee." *Kuehn v. Stanley*, 208 Ariz. 124, 130, 91 P.3d 346, 352 (Az.Ct.App. 2004)

The City contends that "Plaintiff has no evidence that the City inadequately trained or supervised its officers." (Doc. 47 at 8) "Mere proof of a single incident of errant behavior is a clearly insufficient basis for imposing liability on [a municipality]." *Merritt v. County of Los Angeles*, 875 F.2d 765, 770 (9th Cir. 1989); *City of Canton, Ohio*

v. Harris, 489 U.S. 378, 391 (1989) ("adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable").

There is no evidence that Officer Santiago was unfit for his position on April 26, 2008 or that the excessive force allegedly used in this case was reasonably foreseeable by the City. The facts proffered by Plaintiff that as a recruit for the Mesa Police Department in 2001, Officer Santiago initially did not pass the defense tactics final exam, in part, due to incorrect hand placement which he later passed; was involved in a police shooting[15] in 2001; and was involved in two patrol vehicle accidents do not create a question of fact that the City negligently trained or supervised Officer Santiago such that the City may be liable for his alleged use of excessive force in 2008. (PSOF, ¶¶ 50-51, Exh C, doc. 45 at 12) With the dearth of evidence provided on Officer Santiago's training and supervision, no jury could reasonably conclude that the City negligently trained and supervised Officer Santiago and such negligence ultimately caused Plaintiff's injuries. Summary judgment will be granted on Plaintiff's claims of negligent supervision and training. *Celotex*, 477 U.S. at 322 (stating that summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case"); *Ward v. Mount Calvary Lutheran Church*, 178 Ariz. 350, 357, 873 P.2d 688, 695 (Az.Ct.App. 1994) (summary judgment was appropriate when, even inferring negligent supervision in absence of facts establishing such negligence, causation evidence was wholly absent).

E. Punitive Damages

Count VIII alleges Plaintiff is entitled to punitive damages because "the aforementioned acts, omissions, and violations of the Defendants were attended by wanton and willful disregard for the rights and feelings of the Plaintiff." (Doc. 1-4 at 12)

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[15] Officer Santiago was exonerated as a result of the shooting investigation. (Officer Santiago's depo, Exh C at 16, doc. 41-3 at 6)

Defendants argue that Plaintiff may not recover punitive damages against the City or Officer Santiago acting in his official capacity, citing A.R.S. § 12-820.04, *City of Newport v. Fact Concerts, Inc*. 453 U.S. 247 (1981); *Mitchell v. Dupnik*, 75 F.3d 517, 527 (9th Cir. 1996). (Doc. 37 at 9) "To the extent Plaintiff seeks punitive damages against the City, or against Defendant Santiago acting in his official capacity, such claims must be dismissed." (*Id*.) Plaintiff responds that she "is entitled to seek punitive damages under Section 1983 against Officer Santiago in his individual capacity[,]" citing *Coffelt v. City of Glendale*, 2007 WL 4200507 (D.Ariz. 2007). (Doc. 50 at 17)

Plaintiff's own authority establishes that Arizona law forecloses the recovery of punitive damages against the City on her state law claims and federal law precludes the recovery of punitive damages against the City on her § 1983 claim. "A.R.S. § 12-820.04 is squarely in point: 'Neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages[]' [and] The Supreme Court's decision in *City of Newport v. Fact Concerts, Inc*. holds that municipalities are immune from such claims." *Coffelt*, 2007 WL 4200507 at 4 (footnote omitted). *See also, Al-Asadi*, 2010 WL 3419728, * 5-7 (discussion of municipal immunity in Arizona). Plaintiff does not attempt to distinguish the application of this statute or Supreme Court decision to her punitive damages claims against the City or Officer Santiago. Plaintiff, however, does contend that she is entitled to an award of punitive damages on her state law claims against Officer Santiago. Relying upon *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (Ariz. 1986), Plaintiff argues that "[t]he question as to whether Officer Santiago's evil mind may be inferred from his conduct is one that should be left to the jury. It is quite possible that a jury could find that Officer Santiago acted with an evil mind when he twisted Ms. Williams' arm with such force that it snapped." (Doc. 50 at 17) She also asserts she is entitled to seek punitive damages under her § 1983 claim against Officer Santiago in his individual capacity. (*Id*.)

Under federal law, a jury may award punitive damages in a § 1983 case

alleging excessive use of force either "when a defendant's conduct was driven by evil motive or intent, or when it involves a reckless or callous indifference to the constitutional rights of others." *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir. 2005) (citation and internal quotation marks omitted); *Smith v. Wade*, 461 U.S. 30, 33 (1983) (punitive damages may be awarded "if the conduct of one or more of the defendants is shown to be a reckless or callous disregard of, or indifference to, the rights or safety of others."). The plaintiff alleging a § 1983 claim has the burden of proving that punitive damages should be awarded by a preponderance of the evidence. *Sar Pala Ra Anan v. Kimbrell*, 2006 WL 548422, * 3-4 (E.D.Cal. 2006) (quoting Model Civ. Jury Instr. 9th Cir. 7.5 (2005)).[16]

The Court finds that on the question of Plaintiff's § 1983 claim of unreasonable force during arrest, there are sufficient facts from which a reasonable jury could infer that the punitive damages standard was met against Officer Santiago in his individual capacity. Defendants' request for summary judgment on Plaintiff's § 1983 claim for punitive damages will be denied.

In Arizona, "[p]unitive damages are awarded only in the most egregious of cases, where [a plaintiff proves by clear and convincing evidence that the defendant engaged in] reprehensible conduct and acted with an evil mind." *Medasys Acquisition Corp. v. SDMS, P.C.*, 203 Ariz. 420, 424, 55 P.3d 763, 767 (Ariz. 2002) (internal quotation marks omitted) (quoting *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331-332, 723 P.2d 675, 680-681 (Ariz. 1986)). "For that reason, punitive damages should rarely be awarded. In those cases in which they are appropriate, punitive damages should be available to deter egregious conduct." *Id*.

To obtain punitive damages in Arizona, a plaintiff must prove that defendant's evil hand was guided by an evil mind. *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578. It is the "evil mind" that distinguishes action justifying the imposition of punitive

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[16] The current Ninth Circuit Model Civil Jury Instruction on punitive damages, 5.5, offers a choice of either standard - preponderance or clear and convincing. Model Civ. Jury Instr. 9th Cir. 5.5 (2007).

damages. *Linthicum*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (Ariz. 1986). "Punitive damages may not be awarded absent a showing of 'something more' than mere tortious conduct." *Piper v. Bear Med. Sys., Inc*., 180 Ariz. 170, 183, 883 P.2d 407, 417 (Az.Ct. App. 1993) (quoting *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679). "The requisite 'something more,' or 'evil mind,' is established by evidence that defendant either (1) 'intended to injure the plaintiff . . . [or (2)] consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others.'" *Gurule v. Illinois Mut. Life & Cas. Co.*, 152 Ariz. 600, 602, 734 P.2d 85, 87 (Ariz. 1987) (quoting *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578).

While the necessary evil mind may be inferred, it is still this evil mind in addition to outwardly aggravated, outrageous, malicious, or fraudulent conduct which is required for punitive damages. *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680. The quality of the defendant's conduct is relevant only because it provides one form of evidence from which the defendant's motives may be inferred. *Gurule*, 152 Ariz. at 602, 734 P.2d at 87. The more outrageous or egregious the conduct, the more compelling the inference of an evil mind is. *Id*. Nevertheless, the inquiry in every punitive damage case focuses on the defendant's state of mind, which may be established by either direct or circumstantial evidence. *Id*.

The Court has already concluded there is no evidence, direct or circumstantial, that Officer Santiago intended to cause harm or injury to Plaintiff. There is little, if any, evidence in the record, much less evidence of a clear and convincing nature, that suggests Officer Santiago acted with an "evil mind." The Arizona Supreme Court "has made it clear that a jury will not be permitted to consider an award of punitive damages if the evidence supporting such an award is only slight and inconclusive." *White v. Mitchell*, 157 Ariz. 523, 529, 759 P.2d 1327,1333 (Az.Ct.App. 1988) (quoting *Filasky v. Preferred Risk Mutual Insurance Co.*, 152 Ariz. 591, 599, 734 P.2d 76, 84 (Ariz. 1987)). Because the evidence presented does not meet Arizona's high standard to warrant an award of punitive damages, summary judgment on Plaintiff's claim for punitive

damages on Plaintiff's state law claims will be granted.

VIII. Conclusion

In conclusion, Defendants' Motion for Summary Judgment is granted in part and denied in part. The Court concludes that disputed questions of fact exist for jury resolution on Plaintiff's claims for alleged use of excessive force (Count I), negligence (Count III), negligence *per se* (Count IV), and punitive damages on her excessive force claim against Officer Santiago in his individual capacity (Count VIII). Summary judgment is granted on Plaintiff's claims of assault and battery (Count II), negligent supervision and training (Counts VI and VII), and punitive damages against the City, Officer Santiago in his official capacity, and Plaintiff's state law claims (Count VIII).

Accordingly,

IT IS ORDERED that Defendants' Motion for Summary Judgement, doc. 37, is **GRANTED** in part and **DENIED** in part as follows:

1. Defendants' Motion for Summary Judgment on Plaintiff's claims of use of excessive force in violation of her Fourth Amendment rights (Count I), negligence (Count III), negligence *per se* (Count IV), and punitive damages on her excessive force claim against Officer Santiago in his individual capacity (Count VIII) are **DENIED**.

2. Defendants' Motion for Summary Judgment on Plaintiff's claims of assault and battery (Count II), negligent supervision and training (Counts VI and VII), and punitive damages (Count VIII) against the City, Officer Santiago in his official capacity, and on Plaintiff's state law claims are **GRANTED**.

Dated this 8th day of March, 2011.

Lawrence O. Anderson
United States Magistrate Judge